

Rogers (Migration) [2020] AATA 4743 (2 September 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Mark Andrew Rogers
VISA APPLICANTS:	Mrs Denesse Anabel Arguello Cedeno Miss Domenica Thais Tipan Arguello
CASE NUMBER:	1819715
DIBP REFERENCE(S):	BCC2017/4903251 BCC2018/4087656 BCC2018/4087657 BCC2018/4087658
MEMBER:	Meena Sripathy
DATE:	2 September 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.222 of Schedule 2 to the Regulations •

Statement made on 02 September 2020 at 11:11am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – sponsorship limitations – 5 years not lapsed since the earlier visa application – 5 years elapsed during review process – genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 65, 360

Migration Regulations 1994, Schedule 2, cls 309.213, 309.222; 1.03, 1.20

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 May 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) is a 34 Ecuadorian female residing in Quito, Ecuador. She applied for the visa on 21 December 2017 on the basis of her relationship with her sponsor, the review applicant, who is a 48 year old Australian citizen. The second named visa applicant is the visa applicant's daughter. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.222 on the basis of the sponsorship referred to in cl. 309.213 not being approved by the Minister because the sponsor is affected by r.1.20J and the delegate was not satisfied there were compelling reasons affecting the sponsor.
4. On 25 June 2020 the review applicant, through his representatives, provided a submission and supporting documents to request fast track of the review application on the basis that the passage of time since the delegate's decision to refuse the visa has resulted in the criteria in dispute now being met. Further details of the submission are provided in the discussion below.
5. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the visa applicant meets cl.309.222 at time of decision.

Are the sponsorship requirements met?

8. Clause 309.213 requires that the visa applicant is sponsored by the review applicant, where such person has turned 18; or where they have not, by the review applicant's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
9. At the time of decision, this sponsorship must have been approved and still be in force. For visa applications made on or after 18 November 2016 the sponsor must also have consented for the Department to disclose to each sponsored applicant any conviction for a relevant offence, unless the conviction has been quashed or otherwise nullified, or where the sponsor has been pardoned with the effect that he or she is taken never to have been convicted of the offence: cl.309.222. Approval of sponsorship is subject to limitations

contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship, and in r.1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by r.1.20KB in relation to sponsors charged with, or convicted of, certain offences where the visa application was made on or after 27 March 2010 and r.1.20KC in relation to sponsors convicted of a relevant offence who have a significant criminal record where the visa application was made on or after 18 November 2016.

10. On the material before it, the Tribunal accepts that the visa applicant was sponsored at time of application by the review applicant who is an Australian citizen and over the age of 18 years.
11. The delegate's decision record and review applicant's submission to the Tribunal indicates that the applicant previously sponsored Mrs May Susan Tiauzon Rogers for a Prospective Marriage visa, which was lodged on 27 November 2013 and was granted on 10 June 2014. On 13 February 2015 Mrs Rogers lodged an onshore (UK 820) Partner visa application which was granted on 6 March 2015. These details and dates are confirmed in Departmental records.
12. Regulation 1.20J of the Regulations sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship. Under r.1.20J, a sponsor is limited to a total, in a lifetime, of two approved sponsorships or nominations that lead to a grant of a partner visa (or entry permit) or a visa (or entry permit) granted on the basis of the domestic violence provisions. If there has been one previous sponsorship or nomination, or if the sponsor was granted a visa or entry permit as a result of *being* sponsored, a period of 5 years must have passed since the date of the earlier visa application. These requirements apply unless the Minister, or the Tribunal on review, is satisfied there are compelling circumstances affecting the sponsor: r.1.20J(2).
13. As at the time of the delegate's decision (29 May 2018), a period of 5 years had not yet elapsed since the visa application made by review applicant's previous partner. In submissions made to the Tribunal by the review applicant it was pointed out that the calculation of the 5 year period for the purposes of r.1.20J is from the date of the first visa application in respect of the previous sponsorship and the date of decision on the current application. This means that the time runs from 27 November 2013 until now, and therefore over 6 years has now elapsed and the requirements of cl.309.222 are met. It was further submitted that even if the time were to run from the date of 13 February 2015, being the date of the onshore Subclass UK 820 Partner visa application made by the review applicant's previous partner, the 5 year time period has also elapsed and the applicant would meet cl.309.222.
14. The Tribunal has considered the review applicant's submissions, the information before it and the applicable legislative provisions. It finds that, for the purposes of consideration of r.1.20J, another person has been granted a relevant permission as the partner of the sponsor, being Mrs May Susan Tiauzon Rogers who made an application for a Prospective Marriage visa on 27 November 2013 and was granted that visa. The Tribunal finds that a period of 5 years has now passed since that visa application was made.
15. On the evidence before the Tribunal the requirements of cl.309.222 are therefore now met.
16. The Tribunal notes that the review applicant, through his representative, also provided to the Tribunal a detailed submission and supporting evidence of the genuine and continuing relationship between the visa applicant and review applicant addressing the financial and social aspects and nature of the household and commitment aspects of the relationship.

17. The Tribunal observes that the delegate refused the application only on the basis of the visa applicant not meeting cl.309.222 and did not undertake any assessment of the genuineness of the relationship between the visa applicant and sponsor.
18. As the request to the Tribunal for an expedited decision was made on the basis of the satisfaction of the objective criteria in cl.309.222 and given the circumstances that a primary assessment of the genuineness of the relationship has yet to be made by the Department, the Tribunal considers the most appropriate course of action is to remit the applications for the visas to the Minister to consider the remaining criteria for a Subclass 309 visa. Submissions and supporting evidence relating to the relationship issue will be forwarded to the Department for consideration on remittal.

DECISION

19. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.222 of Schedule 2 to the Regulations

Meena Sripathy
Member